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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. ——

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

OESTERLEIN MACHINE COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of David H. Blair, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the decree of the Court of Appeals of the District of Columbia entered in the above-entitled cause on January 3, 1927 (R. 46), affirming the decree of the Supreme Court of the District of Columbia (R. 39).

STATEMENT

The question presented here is whether the Board of Tax Appeals, and, consequently, the courts, have jurisdiction to review the determinations made by the Commissioner of Internal Revenue, in the exer-

cise of the judgment and discretion committed to him by Congress under the provisions of Sections 327 and 328 of the Revenue Act of 1918, which authorized the Commissioner, where abnormal conditions were found by him to exist which made the ordinary formula for computing war-profits and excess-profits taxes work exceptional hardship and produce inequitable results to the taxpayer, to make what has been called a special assessment, so as to approximate the rate of taxation to that paid by other representative corporations in the same line of business.

The provisions of Sections 327 and 328 are set forth in the supporting brief.

This statute provided that where the Commissioner was unable to determine invested capital or was unable satisfactorily to determine the respective values of mixed tangible and intangible property paid in for stock, or where the Commissioner—

> finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328—

then, instead of the tax being computed according to the regular formula prescribed in the statute, the taxpayer's tax should be—

> the amount which bears the same ratio to the net income of the taxpayer * * * as the average tax of representative corporations engaged in a like or similar trade or business bears to their average net income * * * for such year.

The question arises in this case in the way hereinafter described.

The tax returned by the taxpayer and paid by it according to its return for the year 1918 was $54,-351.29. (R. 2.) It returned and paid for the year 1919 $20,453.66. (R. 2.) After the usual proceedings in the Bureau of Internal Revenue, the Commissioner, under date of June 28, 1924, finally determined that the correct amount of the tax for 1918 was $45,055.12, and for 1919 $30,693.75. (R. 9, 4.) The result was that the Commissioner determined that there had been an overassessment for 1918 in the sum of $9,296.17 (R. 10), and that there was a deficiency in the tax paid, and therefore an additional assessment required for the year 1919 in the sum of $10,240.09. In determining the amount of the overassessment for 1918 the Commissioner determined, in accordance with the provisions of Section 327, that the taxpayer was entitled to relief under that section and, in so doing, determined, by comparison with representative corporations as provided in Section 328, what the rate of the tax should be. In passing on the amount of the tax for the year 1919 and in determining the deficiency and the additional assessment required for that

year, the Commissioner refused to apply the provisions of Section 328, and, in the exercise of the discretion vested in him under Section 327, determined that no conditions existed which entitled the taxpayer for the year 1919 to the special relief provided in these sections. The Commissioner also considered the tax for the year 1920 and determined that an additional tax of $182.45 should be imposed for that year (R. 36), but no question is raised respecting that year. Deducting the overassessment for 1918 thus determined from the deficiency determined for 1919 and 1920, the Commissioner determined that there was a net deficiency for the three years of $1,126.37. The taxpayer thereupon took an appeal to the Board of Tax Appeals under the provisions of the Revenue Act of 1924 (R. 11), on the grounds that while the Commissioner had granted the request of the taxpayer for special assessment for the year 1918 under the provisions of Sections 327 and 328, he had not applied the proper percentage based on the taxes paid by other representative corporations, and that, with respect to 1919, the Commissioner had erred in refusing to grant relief under the special assessment provisions.

With respect to 1918, the appeal was based on the theory that although the Act of 1924 allowed an appeal by the taxpayer to the Board of Tax Appeals only in cases where a deficiency was determined to exist by the Commissioner, and his determination of the amount of the overassessment for 1918 could not be reviewed by the Board consider-

ing that year alone, nevertheless since there was a net deficiency determined to exist for the three years considered by the Commissioner, the Board, on that account, had power to review the determination of the Commissioner as to the amount of the overassessment for 1918, which entered into the computation.

When the case reached the Board of Tax Appeals the Commissioner interposed an answer (R. 14), denying that error was committed by him in fixing the rate for computing the profits tax for the year 1918 under the provisions of Section 328, and denying that error was committed in denying to the taxpayer special assessment for the year 1919 under the provisions of Section 328, and objecting to review by the Board of the amount of the overassessment for the year 1918 on the ground that there was no deficiency determined by the Commissioner for that year and the Board had power only to review his determination as to deficiencies.

On March 17, 1925, pending the appeal before the Board of Tax Appeals, counsel for the taxpayer filed with the Board an application for subpœna directed to the Commissioner of Internal Revenue requiring him to answer, in writing under oath, certain questions of fact relating to the taxes of certain other taxpayers who were engaged in a business similar to that of this respondent in the years 1918 and 1919. (R. 5; Exhibit F, R. 26.) This subpœna called for a complete disclosure to

this taxpayer and the presentation before the Board of Tax Appeals not only of the returns but of annexed information on file in the department respecting the income and profits taxes for the years 1918 and 1919 of a number of corporations which were engaged in those years in the business of manufacturing and selling machine tools, which was the business of this respondent. (R. 27–29.) The subpœna was issued by the Board of Tax Appeals directed to the Commissioner of Internal Revenue accordingly. (R. 29.) The Commissioner thereupon filed with the Board an answer to this subpœna stating that in his opinion the proper discharge of his office would not admit the furnishing of the information called for (R. 31–33), and that the Board had no jurisdiction to require the publication in this way of confidential information respecting the taxes and business and returns of other taxpayers. Thereafter the respondent herein filed in the Supreme Court of the District of Columbia a petition requesting that the Commissioner be ordered and directed to obey the subpœna and produce and disclose the information called for. (R. 1–8.) A rule to show cause was issued (R. 35), and the Commissioner interposed an answer (R. 36) in which he contended that he is prohibited by Section 3167 of the Revised Statutes of the United States as reenacted in Section 1317 of the Revenue Act of 1918, Section 1311 of the Revenue Act of 1921, and Section 1018 of the Revenue Act of 1924 from making public or disclosing the information called

for. He denied that it was or is the duty of the Board of Tax Appeals, in order to enable it to fully perform in this case the functions for which it was created, to examine or disclose or make public the income-tax returns of other corporations. (R. 37.) The Commissioner also filed a motion to dismiss the petition, in which he asserted that the Board of Tax Appeals has no jurisdiction to review the action of the Commissioner in fixing a rate of taxation in compliance with the law relating to special assessments or in refusing to grant a special assessment under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 38–39.) Thereupon, on June 29, 1925, the Supreme Court of the District, denied the Commissioner's motion to dismiss, and entered a judgment directing him to obey the subpœna theretofore issued by the Board. (R. 39.) The Commissioner took an appeal to the Court of Appeals of the District of Columbia, assigning as error that the Supreme Court of the District had erred in overruling his motion to dismiss and in not holding that the Board of Tax Appeals is without jurisdiction to review the determination of the Commissioner under the provisions of Sections 327 and 328 of the Revenue Act of 1918. (R. 40.)

The Court of Appeals entered a judgment on January 3, 1927, affirming the judgment of the Supreme Court of the District, and it is to review this judgment of the Court of Appeals that the writ of certiorari is now sought for.

40826—27——2

SPECIFICATION OF ERRORS

The Court of Appeals of the District erred—

I. In affirming the judgment of the Supreme Court of the District.

II. In holding that the Board of Tax Appeals had jurisdiction to review the determination of the Commissioner of the amount of the overassessment for 1918, because there was a net deficiency determined for that year and others.

III. In holding that the Board of Tax Appeals had jurisdiction to review the determination of the Commissioner, made in applying the provisions of Sections 327 and 328 of the Revenue Act of 1918, as to the rate of the tax for the year 1918.

IV. In holding that the Board of Tax Appeals had jurisdiction to review the decision of the Commissioner that, for the year 1919, the taxpayer was not entitled to special assessment under Sections 327 and 328 of the Revenue Act of 1918.

V. In holding that all of the information called for by the subpœna in question, including the returns and detailed information respecting the affairs of other corporations engaged in the same line of business for the years 1918 and 1919, must be disclosed to this respondent and become a public record before the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

I. The provisions of the Act of 1918, granting special relief by way of special assessment where the regular formulæ for determining taxes would

work exceptional hardship, are relief provisions, and the terms of the statute justify the contention that there was reposed in the Commissioner a discretion to determine whether such provisions should be applied, and, if applied, what the rate of taxation should be, by comparison with other representative corporations. The relief provided for was not a matter of right, but a matter of grace, and the nature of the subject matter dealt with and the terms of the statute justify the contention that the determination by the Commissioner was final.

II. If the determination of the Commissioner is subject to review by the Board of Tax Appeals, as held by the courts below, it is likewise subject to review by the courts. Many thousands of these special assessment cases have been disposed of by the Bureau of Internal Revenue and closed upon the books on the supposition that the Commissioner's findings and determination dispose of the cases. The decision below raises a serious administrative problem, in that it opens thousands of these cases to applications for refund and to suits in the courts to recover taxes alleged to be illegally assessed, since if the Board of Tax Appeals has power to review the Commissioner's decision the courts have the same power.

III. If the decision below is allowed to stand and the determination of the Commissioner in these special assessment cases is held to be reviewable by the Board of Tax Appeals, with the consequent re-

sult that it is also reviewable by the courts, the doors are opened to applications and suits for refunds which the Treasury Department estimates may exceed $100,000,000.

IV. If the decisions below are not reversed, it will result that any taxpayer who is in a position to claim special assessment is entitled to examine and inspect the returns of all other corporations engaged in a similar business and to examine and inspect all of the information on file in the department relating to the returns of competitors, and such information, when presented to the Board of Tax Appeals, becomes a public record and the result will be to give publicity, so carefully guarded against by other provisions of the Act, to the returns of many taxpayers.

V. If the Board of Tax Appeals has power to review the determination of the Commissioner, the courts have similar power, and will be called upon, in suits to recover taxes alleged to have been illegally collected, to determine, or submit to juries for determination, a mass of information and material respecting corporations engaged in a line of business similar to the taxpayer, and will be entitled to and required to subpœna other taxpayers engaged in a similar line of business to produce evidence respecting their business and taxes for use as a basis to apply the provisions of the special assessment sections. The nature of the subject matter is such that it is wholly impracticable for courts and juries to endeavor to substitute their judg-

ments for that of the Commissioner and attempt to apply the special assessment sections.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

MARCH, 1927.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

No written opinion was filed by the Supreme Court of the District. The opinion of the Court of Appeals has not been reported, but will be found at page 42 of the record.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered January 3, 1927. (R. 46.) Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question presented is whether the provisions of Sections 327 and 328 of the Revenue Act of 1918, providing for special assessment and a special method of determining the war profits and excess profits tax rate of certain taxpayers where the application of the ordinary statutory formula

works hardship or is impracticable, contemplate that the decision of the Commissioner of Internal Revenue as to whether the special assessment provision should be applied, and, if applied, what the rate should be, shall be final or subject to review by the Board of Tax Appeals and by the courts.

THE STATUTES

Sections 327 and 328, Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1093).

Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax com-

puted without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

Sec. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily

determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

> (c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

The provisions of the Revenue Act of 1924, relating to determination of deficiencies by the Commissioner of Internal Revenue and authorizing appeals to the Board of Tax Appeals to review the decision of the Commissioner as to deficiencies, are set forth in Appendix A.

STATEMENT

The facts are sufficiently stated in the petition for certiorari.

ARGUMENT

The material set forth in the petition, together with the applicable statutes, sufficiently discloses that there is substantial ground for the contention that Sections 327 and 328 of the Revenue Act of 1918, by reason of the expressions used and the nature of the subject matter dealt with, contemplated that the granting of relief to taxpayers in

the form of special assessment under these sections was a matter entrusted to the discretion of the Commissioner, the only check on the exercise of that discretion being the requirement that he should make his determination a matter of record and should report to Congress the cases in which he had applied the special assessment provision. Looking at Sections 327 and 328, the conclusion is almost irresistible that it was the intention to entrust the decision to the Commissioner and make his decisions final. Section 327 (a) provides that the tax shall be determined under Section 328 "where the Commissioner is unable to determine the invested capital." Subdivision (c) provides that Section 328 shall be applied if "the Commissioner is unable satisfactorily to determine the respective values of the several classes of property," etc. Subdivision (d) provides that the special assessment allowed in Section 328 may be applied where, upon application by the corporation, "the Commissioner finds and so declares of record" that the tax, if determined without the benefit of this section, would work exceptional hardship, evidenced by gross disproportion between the tax computed without the benefit of the section and the tax computed by reference to the representative corporations specified in Section 328. These provisions, fairly construed, indicate that it is the Commissioner who must be unable satisfactorily to himself to determine these things, and it must be the Commissioner who finds and so declares of record that hardship would

result, and it must be the Commissioner who is unable to determine invested capital, as provided in Section 326, before special assessment shall be granted.

The decision below is to the effect that the special assessment provisions in Section 328 may be applied if the Board of Tax Appeals or a court or jury is unable to determine the invested capital or if the Board or the courts are "unable satisfactorily to determine" the respective values of classes of property paid in for stock, or if the Board or a court or jury "finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions" impose hardship, and that it is open to the Board of Tax Appeals and, consequently, to a court and a jury to examine the mass of confidential material available in the Bureau of Internal Revenue respecting the business and taxes of other taxpayers engaged in the same line of business, and to compel the production of original evidence from such taxpayers in order to enable the Board or court or jury, as the case may be, to make the comparison with respresentative corporations and determine through such comparison an equitable rate of taxation. It is hard to believe that Congress intended any such result.

The respondent claims, and the courts below held, that the general provisions of the statute giving the Board of Tax Appeals jurisdiction to review on

appeal determinations by the Commissioner that deficiencies exist in the amount of the tax paid for any year by a taxpayer give the Board power to review the determination of the Commissioner, which may enter into the determination of the deficiency, that the taxpayer is not entitled to special assessment, or, if he is, the determination as to what the rate should be by comparison with representatives. This result does not follow from the general provisions giving jurisdiction to the Board to review determination of deficiencies. The provisions respecting jurisdiction of the Board and the provisions of Sections 327 and 328 should be construed together, and it should be held that the general power to review the determination of the Commissioner that a deficiency exists is subject to the qualification in special assessment cases that, in so far as the determination of the Commissioner under the special assessment provisions enters into the determination of the deficiency, his findings must be accepted by the Board, with the result, in cases like the present, that, where the review asked of the Board respecting a determination of deficiency involves *only* a review of the Commissioner's findings under the special assessment provisions, the Board is without jurisdiction to act. To put it in another way: On an appeal, taken to review a determination as to a deficiency, whenever it appears to the Board, as it did appear in this case, that no question is raised except the propriety of the Commissioner's findings under the special assessment provisions,

the Board should cease to proceed further and should dismiss the appeal or affirm the finding of the Commissioner and not attempt to compel the production of evidence to enable it to review his finding. To support this construction of the statute, it is proper to emphasize the fact that the construction adopted by the court below will result in opening to public inspection, at the instance of any taxpayer engaged in a particular line of business, the reports and confidential information on file with the Bureau of Internal Revenue of all other taxpayers engaged in a similar line of business, and will result further—since the courts may review the Commissioner's finding if the Board may—in the compulsory production before judicial tribunals and juries of original evidence from other taxpayers engaged in similar lines of business, in order to enable the court to determine, by comparison with representative corporations, the rate of taxation that should equitably be applied. This is so, because in no case in which the Board may review the findings of the Commissioner, or a court may review those findings, are these tribunals limited to considering the evidence available in the files of the Bureau of Internal Revenue. No construction of the statute should be adopted which results in publicity of tax returns and confidential information which have been so carefully guarded by the other provisions of the Revenue Acts.

To step aside for a moment from the main questions in the case, it will be noted that this case raises

the question whether, under the Revenue Act of 1924, the Board of Tax Appeals, having jurisdiction on appeal only to review determinations of deficiencies, may review a determination of an overassessment for any year merely because the Commissioner has considered several years together and by offsetting the overassessment of one year against the additional assessment for another determined that for a period of years a net deficiency exists. If, as must be admitted, the Board had no power under the 1924 Act to review a determination by the Commissioner of an overassessment for a single year taken by itself, it is hard to believe that Congress intended that it should have that power by indirection where several years are considered together and a net deficiency for the series of years is determined by the Commissioner.

The Board of Tax Appeals held that under the Act of 1924 it had such power. (*Appeal of E. J. Barry,* 1 B. T. A. 156.) It has held that under the Revenue Act of 1926 it has no such jurisdiction. (*Appeal of Cornelius Cotton Mills,* 4 B. T. A. 255.) This latter decision is based on the provisions of Section 274(g) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 56, which reads as follows:

> The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to

> determine whether or not the tax for any other taxable year has been overpaid or underpaid.

If the Board had no jurisdiction under the provisions of the Act of 1924 to review indirectly the determination of overassessment for 1918, then the writ of subpœna which was issued was unauthorized in that it called for information for that year respecting other representative corporations. If the Board had jurisdiction to consider a determination of overassessment because a net deficiency was determined for a series of years, then we have presented two questions raised by the fact that the subpœna called for information respecting 1918 and 1919, viz, whether the determination of the Commissioner as to the rate of taxation under Section 328 may be reviewed in a case where he determines to apply the special assessment provisions, and whether the determination of the Commissioner that the taxpayer is not entitled to special assessment may be reviewed.

That the case is an important one and presents questions justifying the issuance of a writ of certiorari seems to be made clear by the above discussion as to the merits and by the disclosures in the petition for certiorari under the head of "Reasons for Issuing the Writ," which show that by this decision the doors have been opened to applications and suits for refunds in vast sums, and to the opening of thousands of cases which have been consid-

ered closed, and to publicity of confidential information respecting taxpayers.

In Appendix B is an opinion just rendered by the District Court of the United States for the Northern District of Ohio in *The Feilbach Company* v. *Niles, Collector,* dealing with Section 210 of the Revenue Act of 1917, which granted relief similar to that provided in Sections 327 and 328 of the Revenue Act of 1918. The decision of the District Judge indicates that, in his opinion, the determination of the Commissioner in such cases is only reviewable on a showing that he acted arbitrarily and without justification.

Of course, if the Board of Tax Appeals or a court may inquire whether the Commissioner's decision is arbitrary or without any evidence to support it, the Board or court, as the case may be, has a right to have produced the material in the Bureau on which the Commissioner acted.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.
CHARLES T. HENDLER,
Special Attorney,
Bureau of Internal Revenue.

MARCH, 1927.

Appendix A

(Revenue Act of 1924, c. 234, 43 Stat. 253)

Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title [relating to income and profits taxes], the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.

* * * * *

Sec. 279. (a) If a deficiency has been assessed under subdivision (d) of section 274, the taxpayer, within 10 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the

claim immediately to the Commissioner who shall by registered mail notify the taxpayer of his decision on the claim. The taxpayer may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. * * *

* * * * *

Sec. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

* * * * *

Sec. 308. (a) If the Commissioner determines that there is a deficiency in respect of the tax imposed by Part I of this title [relating to estate taxes], the executor, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the executor may file an appeal with the Board of Tax Appeals established by section 900.

* * * * *

Sec. 312. (a) If a deficiency has been assessed under subdivision (d) of section 308, the executor, within 30 days after notice and demand from the collector for the payment thereof, may file with the collector a claim for the abatement of such deficiency, or any part thereof, or of any interest or additional amounts assessed in connection therewith, or of any part of any such interest or additional amounts. Such claim shall be accompanied by a bond, in such amount, not exceeding double the amount of the claim, and with such sureties, as the collector deems necessary, conditioned upon the payment of so much of the amount of the claim as is not abated, together with interest thereon as provided in subdivision (c) of this section. Upon the filing of such claim and bond, the collection of so much of the amount assessed as is covered by such claim and bond shall be stayed pending the final disposition of the claim.

(b) If a claim is filed as provided in subdivision (a) of this section the collector shall transmit the claim immediately to the Commissioner who shall by registered mail notify the executor of his decision on the claim. The executor may within 60 days after such notice is mailed file an appeal with the Board of Tax Appeals. * * *

* * * * *

Sec. 900. (a) There is hereby established a board to be known as the Board of Tax Appeals (hereinafter referred to as the "Board"). * * *

* * * * *

(e) The Board and its divisions shall hear and determine appeals filed under sections 274, 279, 308, and 312. * * *

* * * * *

(h) * * * Hearings before the Board and its divisions shall be open to the public. * * * All reports of the Board and its divisions and all evidence received by the Board and its divisions (including, in cases where the oral testimony is reduced to writing, the transcript thereof) shall be public records open to the inspection of the public. * * *

(i) For the efficient administration of the functions vested in the Board or any division thereof, any member of the Board may administer oaths, examine witnesses, and require, by subpœna ordered by the Board or any division thereof and signed by the member, (1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing, (2) the taking of a deposition before any designated individual competent to administer oaths under this Act, and (3) the answer in writing under oath to any question of fact submitted. In the case of a deposition the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall then be subscribed by the deponent. * * *

* * * * *

(k) * * * The Board shall be an independent agency in the executive branch of the Government.

Appendix B

In the District Court of the United States for the Northern District of Ohio, Western Division. The Feilbach Company, plaintiff, against Frank B. Niles, Collector of Internal Revenue, defendant. At law, 3185

MEMORANDUM OPINION

Killits, J.:

Section 210 of the Revenue Act of 1917 must be considered to be an administrative provision for the guidance of the Commissioner of Internal Revenue in the determination of invested capital, upon which computation of excess-profits tax may be made in those somewhat unusual occasions when the very definitive section (207) can not be applied. It seems obvious that the circumstances which would clothe the Commissioner with the discretion to apply Section 210 would occur somewhat rarely in the administration of the law, because Congress was somewhat meticulous in its definition of what invested capital should be considered to be, and how it should be ascertained, in the writing of Section 207, whose terms manifestly would meet the conditions in a vast majority of cases.

The section under consideration, 210, is one whose provisions are to be invoked primarily and most generally by the Commissioner alone. Very, very rarely, and under quite extraordinary circumstances, it would seem, can the section be resorted to as a mode of relief by the taxpayer. The statute limits resort to it to only when the Commissioner finds that he can not "satisfactorily" ascertain invested capital for the computation of excess-profits

tax under Section 207. It would follow that, if the Commissioner or his agents actually computes capital under 207, his action should be presumed to exclude any application of Section 210, the burden then being upon a claimant to relief under the provisions of the latter section to show that the Commissioner acted arbitrarily and without justification. It would be a rare case indeed wherein a court would be justified in concluding that the Commissioner could not "satisfactorily" apply the provisions of Section 207 to a determination of the question, when, in fact, the Commissioner satisfied himself that he could so do.

Reading the allegations of the petition in light of this consideration of the statutes in question and the Commissioner's action thereon, we find no reason for the interposition of the court in the form of a review of his judgment.

It is evident that Congress, in framing Section 207, intended not only to prevent vague and difficult determinations through the examination of circumstances hard to establish, but to set up standards of determination so rigid and so easily applicable that only a very extraordinary condition would justify a determination that the section was not workable. *Cartier* v. *Doyle,* 277 Fed. 150; *La Belle Iron Works* v. *United States,* 256 U. S. 377. Applying the authorities just cited and going to the four reasons set up as indicating that the Secretary of the Treasury in the instant case could not satisfactorily determine invested capital, we are unable to find that such a conclusion is a proper deduction. Section 207 seems to this court to read to the exclusion of any one of these four alleged facts; nor

do the four of them cumulated tend to take the present situation out of the operation of the section in question, and, therefore, afford the plaintiff relief. On the contrary, as we read Section 207, it negatives the ability of the taxpayer to resort to any of these reasons to exonerate it from the provisions of that section.

The demurrer, therefore, to the petition is sustained.

——— ———, *Judge.*

MARCH 25, 1927.

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